In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 461

HEVI-DUTY ELECTRIC COMPANY, A DIVISION OF SOLA BASIC INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 410 F. 2d 757. The Board's decision and order are reported at 172 NLRB No. 98 (Pet. App. 3-13); its decision in the related representation proceeding is set forth at Pet. App. 14-20.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1969 (Pet. 2). The petition for a writ

of certiorari was filed on August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly overruled the employer's objections to a representation election without holding an evidentiary hearing, upon finding that the objections presented no material issues of fact.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
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> * * *
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
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> * * *
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> Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

The relevant provision of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 C.F.R. 102.1, *et seq.*), is set out at Pet. App. 23.

STATEMENT

Pursuant to a stipulation of the parties, a representation election was held at the Hevi-Duty Electric Company plant at Goldsboro, North Carolina on November 1, 1967. The Union, the Communications Workers of America, AFL-CIO, won the election and the Company filed objections with the Board's Regional Director alleging that: (1) a Union election observer, Perry Wyatt, engaged in electioneering and deported himself in such a manner as to give the impression that the Union was dominating the election procedure; and (2) at the conference held prior to the election, the Union frivolously challenged one of the Company's observers on the ground that he was a supervisor, causing him to be removed as an observer—thereby interfering with the Company's rights and again giving the impression that the Union was dominating the election procedure (Pet. App. 18).

After an administrative investigation of the Company's objections, the Regional Director reached the following conclusions respecting the first objection: The Company and the Union agreed that each would have two observers at the election, one to identify employees at the polls and the other to carry signs throughout the plant releasing particular groups of employees to vote. Company witnesses stated that Perry Wyatt, a Company employee and the Union's releasing observer, waved the releasing sign from side to side and shouted "Winders now voting" as he went through the Winding Department; that Wyatt

spoke to several voters as he showed them the sign and stopped three voters and engaged them in short conversations as they progressed toward the voting area, but they did not overhear what was said; and that, toward the end of the polling period, both Wyatt and the Company's releasing observer told some employees that the polls would close shortly and that there was not much time left for voting. There was no evidence that Wyatt engaged in any electioneering or in any activities calculated to impair the exercise of free choice in the election. (Pet. App. 18-19.)

Respecting the second objection, the Regional Director found that at the preelection conference the Company was informed that the Union planned to challenge the ballot of Wilbur Kauff, on the ground that he was a supervisory employee. Kauff was to have been a Company observer, but the Company then substituted another. There was no evidence that the Company's voluntary withdrawal of Kauff as an observer in any way interfered with its rights or the rights of its employees, impeded the election process, or gave the impression to employees that the Union dominated the election. (Pet. App. 20.)

The Regional Director concluded that the Company had raised no substantial or material issues with respect to the conduct of the election which warranted an evidentiary hearing, and recommended to the Board that the Company's objections be overruled (Pet. App. 20). The Company filed exceptions to the Regional Director's report that contested his conclusions, including his failure to order a hearing on the

objections (R. 13-18).[1] The Board upheld the Regional Director, finding that the Company's exceptions "raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing" (Pet. App. 15, n.1).

The Company refused to bargain with the Union, and an unfair labor practice complaint issued. The Trial Examiner granted the General Counsel's motion for summary judgment (Pet. App. 8-9). The Board adopted the Trial Examiner's decision holding that the Company had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union (Pet. App. 3-4). The court of appeals sustained the Board's findings and enforced its order (Pet. App. 2).

ARGUMENT

The question posed by petitioner (Pet. 2)—whether "an objecting party [is] entitled to a post-election evidentiary hearing when * * * prima facie evidence is supplied which presents substantial and material factual issues regarding the validity of such election"—is not presented on this record. The Regional Director, who was upheld by the Board, found that petitioner's objections presented no substantial or material factual issues; and the court below sustained that finding. Thus, the petition presents only the factual issue whether petitioner's ex-

[1] "R." refers to the appendix filed by the parties in the court below.

ceptions raised material or substantial factual issues. Such an issue does not warrant further review.

Moreover, the Board properly declined to conduct an evidentiary hearing in this case. As the Fifth Circuit recently pointed out: "If the objecting party shows, by specific evidence which *prima facie* would warrant setting aside the election, the existence of substantial and material factual issues which can be resolved only after an opportunity to observe and examine witnesses, an evidentiary hearing will be ordered. [Citations omitted.] To meet this burden, there must be 'specific evidence of specific events from or about specific people' in support of allegations having a basis in law sufficient to overturn the election. [Citations omitted.]" *National Labor Relations Board* v. *Golden Age Beverage Co.*, 71 LRRM 2924, 2928-2929 (No. 26286, July 7, 1969).[2] Petitioner failed to satisfy this test. As the Regional Director found: "Wyatt was described by witnesses presented by the Employer as being in a jovial mood, contrary to his usual nature, but no evidence exists to show that Wyatt engaged in any electioneering or in any activities calculated to impair the exercise of free choice in the election" (Pet. App. 19).

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[2] There, the Fifth Circuit distinguished the line of cases relied on by petitioner (Pet. 6-7), on the ground that they "involve objections whose very nature and possible impact upon the employees' free choice are of an entirely different order than */ * * [the] poorly supported and insubstantial objections [here] * * *." 71 LRRM at 2929-2930, n. 6.